COLUMBIA LAW REVIEW.

VOL. II. MAY, 1902. No. 5.

GENERAL AVERAGE LIABILITY WITH CARGO FOR SUCCESSIVE PORTS.

Perhaps the most intricate branch of the law maritime is found in the applications of the doctrine of general average. An attempt is made to even up, among all interests, the outlays, burdens and sacrifices in the course of the voyage. If they have arisen from necessity and were intentionally incurred for the common utility they are regarded as common to all.[1] This community, founded on necessity, often evoked in situations of distress—the doctrines of which are found highly developed in its earliest recorded statement—has led to much speculation as to the origin of a practice of such convenience. Grotius regarded the underlying idea of general average, as a community from necessity, in time of distress, and saw in it a surviving fragment of the primal community of goods, out of which had come property rights. As men had forsaken this community for their own benefit, said Grotius, "it is not strange that they should be brought back to that state from necessity, which is stronger than utility."[2]

The three contributing interests in general average are vessel, freight and cargo. Their relations and the accounting between these coadventurers are compared to three

[1] "Generaliter placere potest, damnum pro utilitate communi factum, commune esse." Bynkershoek, Quest. Juris. Priv., lib. 4, c. 24.

[2] Introduction to Dutch jurisprudence, Book III, c 33, § XVII.

fellow-tourists making a common journey. As opportunity occurs they pay for one another, but in the end all these common outlays are to be apportioned so that each may bear his personal quota. As this settlement would ordinarily take place when the end of the journey is reached, or when the party breaks up, it is said that the apportionment and statement of general average is to be made where these interests finally separate. However, this analogy to three tourists cannot quite parallel the three maritime interests, since the peculiar powers of the ship, its predetermined route and destination distinguish and separate the rights and duties of its owner from the passive cargo interest. Still the general theory is accepted that the place of intended destination, if the ship reaches it, or the port where the voyage may be broken up by disaster, are the places where this accounting is to be stated and liquidated. As the parties have the right then and there to appeal to the local courts for the rectification of any injustice in such a division, it follows that the statement and settlement of such a contribution is to be governed by the *lex loci* of the port where the voyage ends.

Suppose, however, that a modern steamer with great cargo capacity cannot be profitably employed carrying goods between only two termini. Her owner puts her up as a general carrier for a series of ports extending half around the world, at any of which cargo is to be landed; possibly, too, new cargo is received and laden at such intermediate ports. This traffic is becoming common in the Pacific. Steamers bound east via the Suez Canal regularly run directly through a succession of British, French, Chinese and Japanese ports, perhaps in the end delivering steel rails at Vladivostock. Which law is then to settle the general average difficulties arising in such an extended sea transit? Is the Russian law of Vladivostock to govern cargo interests unladen and finally separated from the common adventure at the first port, say at Singapore, where British law obtains? If a ship have goods for several ports in succession, at any of which she may make partial discharge of cargo, at what place is the adjustment of general average to be stated?

The text-book authorities in the United States are ap-

parently in accord on this question, and hold that the adjustment is to be deferred as long as the contributing interests continue together, but if these interests are to be separated, then the adjustment is to be made at the port where the separation first takes place.[1] Hence, distinct adjustments in different stages of the same long voyage may become necessary, since the value and fate of the goods change at these successive stages of delivery.[2]

In the case supposed, if a jettison have occurred for the common safety before reaching Singapore, and a part of the cargo is there to be landed, the contribution can there be stated and settled, and the cargo there discharged should not be affected by the fact that at subsequent stages of the voyage the residue of the adventure, both ship and cargo, be totally lost; and by its destruction freed from making any contribution. The difficulty is to reconcile the conflicting interests of the owners of cargo having these different destinations. The owner of goods bound for Vladivostock may plausibly maintain that his cargo at Singapore is still far from its destination, and being still subject to the hazards of the completed adventure should not be called on to pay or secure general average until its ultimate arrival. He would argue that the shipper of the Singapore cargo knew that the ship was going on to other more remote ports, and that, by entrusting his cargo in a vessel with so many ports of delivery, he impliedly agreed to let his goods wait till the entire adventure had terminated. Such a view, however, is contrary to many legal analogies. The law merchant deems each passage from port to port as a "voyage," and therefore subdivides the prolonged transit supposed into a series of separate voyages, each with its own incidents and entitled to its separate accounts and collections from the component interests as they exist together on that single voyage. This applies also to ships that load at successive ports. The cargo received at the fourth port is entitled to hold the owner to the full warranty of seaworthiness there, and the shipowner cannot go back to the first port, and prove that then the voyage began for all interests, and that then his ship was in a seaworthy condition.

The sound doctrine declared in the United States is that

[1] Parsons, Mar. Ins., vol. 2, p. 361. [2] Phillips, Ins., 5th ed. § 1376.

each voyage or trip, each separate journey which the ship makes from one port to another, must be treated as a separate venture, involving its own separate hazards, losses, and earnings.[1]

Notwithstanding this advantage in clearness and precision in regarding the rights to settle the average as enforcible at the first port of separation, this view is not accepted in England. Mr. Carver in his Carriage by Sea prefers the last port. His reasoning is that shippers to the first port are not entitled to regard all the coadventures as though they were also shippers to the same port. "The difference is far broader; it is that between owners of goods which have, and have not, accomplished the adventure."[2] He therefore concludes that in this conflict the contribution should be in proportion to benefit, from which he reasons that the adjustment should take place at the end of the voyage, on the basis of arrived values as then ascertained.[3] Lowndes is very undecided, and lays stress on the difficulties of fixing the place of adjustment in the absence of a legal adjudication of the question.[4] Mr. Gow,[5] and the seventh edition of Arnould's Treatise on Insurance[6] treat the point as still awaiting judicial action. A French author views this question of the place applicable to the adjustment as merely one of usage, and remarks that the custom to apply the law of the place where the risks terminate is quite general, but not obligatory or substantial.[7] The Italian authority, Berlingieri, distinctly favors the idea of adopting the port of final discharge as the place of adjustment; merely reserving to the captain the right to take security from the consignees of cargo discharged in intermediate ports, for the payment of the eventual quota of contribution ascertainable in the final port.[8] It does not

[1] The Alpena (1881) 8 F. R. 280, 283. [2] Carriage by Sea, § 425.
[3] § 425. [4] General Average, pp. 272, 275, 4th ed.
[5] Treatise on Insurance, p. 303, 2d ed. [6] § 992.
[7] Frignet, Traité des Avaries, vol. 2, § 701, Paris, 1859. "S'il est d'usage presque constant de la dresser au lieu de destination ou de reste du navire, c'est que la navigation étant terminée et les risques ayant cessé à ce moment, c'est là qu'on peut le mieux apprécier l'étendue des dommages éprouvés et la chiffre des dépenses effectuées; mais il n'y a là rien d'obligatoire et de substantiel."
[8] Delle Avarie e della Contribuzione nelle Avarie Comuni, § 180, p. 272, Turin, 1888. Prof. Pipia of Genoa also suggests a provisional quota for the discharged cargo at the intermediate port of separation estimated approximately, which shall be subject to a final controlling adjustment at the end of the voyage. Trattato di Diritto Marittimo, vol. 2, p. 174, Milan, 1901.

appear that these text writers had considered the reasoning on this subject by the German and Scandinavian authorities.

As a matter of principle, it seems clear that the carriage of cargo for each separate port is a distinct adventure, having its own special incidents. Cargo going only to Port A., and there discharged without having incurred any general average liability, is separated from the adventure, and entirely freed from any loss or gains that may be developed in the further incidents of the voyage to ports B. and C. If there has already been a general average sacrifice by which this intermediate cargo is entitled to contribution, plainly this is a perfected right, and enforcible in the courts of the first port of separation, and the quota due should not be subsequently diminished or impaired, even if later a total loss should come to the ship and the remaining cargo destined for ports beyond. In other words, wherever the local court would have power and jurisdiction to enforce contribution, the law of that place would govern the rights of the parties, and such contribution should then be payable without regard to the subsequent parts of the voyage.

This appears to have been long ago decided in a maritime case quoted by a German author of high authority.

"A case of this kind in the year 1829 came before the Hamburg Handelsgericht for decision. A ship from Bahia was bound with cargo to Bremen and also Hamburg. In the English Channel it sustained damage by press of sail. Arrived in the Weser, where the Bremen cargo was to be discharged, the master there demanded contribution in general average; the adjuster declined this, because by Bremen local law, damage by press of sail is treated as particular average. After discharge of the part cargo destined for Hamburg, the final port, where damage by press of sail was allowed in general average, the owner sought to enforce contribution from the cargo there for the damage in question. This failed, as the decision in the second instance declared 'Since in case of several ports of destination, the adjustment of general average is not to be made up first at the end of the voyage, but rather is to be stated at the end of each portion of the voyage [am Ende einer jeden Reiseabtheilung] for the last portion traversed.' The need of this treatment of the matter further appears in that the continuance of the voyage exposes the contributing interests (ship cargo and freight) to further dangers. If later there be a total or partial loss, and the adjustment should be postponed to the final end of the voyage, then the claimant of contribution against those objects that were fixed at the first port runs the risk of losing his recovery." [1]

[1] Voigt, Das deutsche Seeversicherungs Recht, pp. 528–9, Jena, 1887.

In Marseilles a case arose in 1845 where a ship had loaded cargo for Marseilles, also for Cette and Montpelier. Before reaching Marseilles the vessel incurred a salvage liability, and the master had given an hypothecation upon vessel and cargo, payable at Marseilles. On arrival there this obligation was put in suit, the vessel had also to discharge cargo and make repairs before continuing her voyage to Cette. An adjustment was made up in Marseilles provisionally, mainly for the purpose of distributing these salvage charges. A suit was brought against the Cette consignees to obtain a judicial declaration that this adjustment should be binding on them also as well as those at Marseilles. They defended on the ground that they were not bound to regard any adjustment until their cargo should have reached the port of final destination. It appeared that the Marseilles cargo was three-fourths of the entire lading. The tribunal said that in such case the adjustment might properly be made in the port of destination to which the larger part of the cargo was consigned. The real point in judgment, however, was that the salvage creditors, having taken proceedings at Marseilles for their hypothecation, had thereby conferred on the local court jurisdiction to settle there the general average.[1]

A prominent German authority declares regarding goods discharged at an intermediate port:

The discharged goods are subject to an independent fate. The enhanced value which the further prosecution of the voyage might bring, cannot benefit them. It is therefore unreasonable to let them be assessed for its losses. Hence the reciprocal rights and duties between cargo discharged and that remaining should be settled by the state of affairs at the place of partial discharge (am Orte der Theillöschung)." [2]

The Commissioners of Revision of the recent Shipping Codes for the Scandinavian states have also dealt with the same difficulties in the Report of the Reasons for the New Shipping Legislation. They thus state the embarrassing question before them:

"As a rule the ship discharges the entire cargo in one place; but in the steamship trade especially it frequently happens that a ship has several places of destination, as, on the way to the final port, it touches at intermediate ports in order there to deliver portions of its cargo. In such cases

[1] Martin c. Gaudy, Journal de Jurisprudence de Marseille (1845) 1 p. 273.

[2] Heck, Das Recht der Grossen Haverei, p. 360, Berlin, 1889.

it has been controverted, where the settlement of an average, which has happened on the voyage between the place of departure and an intermediate port, ought to take place. Each consignee might have the privilege to demand the relation settled according to the laws of the place where the voyage ends for his account. For the consignee in the intermediate port this is the real end-point for his voyage, and the risk in which he has been participant; the following part of the voyage does not concern him, but only some of the originally interested persons; when the sacrifice, for instance, has touched the cargo which is delivered in an intermediate port, it will be highly unjust that the cargo owner's demand for average allowance should depend on the contingencies of the later voyage in which he has no part. On the other hand, it must be granted that an adjustment settled in an intermediate port could not be unconditionally binding upon the one who is to receive cargo in a place of later discharge, or for the shipowner in his relation to such a consignee. * * * If, for instance, a ship which has been obliged to touch at a port of refuge, has to deliver half her cargo in an English port and the rest at Copenhagen, the rule that the adjustment should be settled in Copenhagen, with binding effect for all, would lead to the result that the English cargo owner would be compelled, against the English law, to pay for wages and provisions, only for the reason that the residue of the cargo, in which he is not concerned, continues the voyage to Copenhagen. If the rule, on the contrary, was that the adjustment in his case should be settled in an intermediate port, the shipowner would lose wages and provisions from the Danish consignee, because the ship had discharged one part of her cargo in England."[1]

Accordingly, the new maritime codes, as adopted for Denmark, Sweden and Norway, have declared that the adjustment and apportionment of general average shall take place, not at the port of destination, but, "at the port where ship and cargo separate (or where the adjustments of averages are generally made for such port) and in pursuance of the law of that place.[2]

The difficulty about valuation in case of an adjustment at an intermediate port has been further discussed by Heck. He concludes as follows:

"Every interest has a claim that the consequences of the general average act shall close with the term in which the community of adventure continues with the other interests. If this common fate ceases at different intervals for different participants in the adventure, then the claim for contribution must be adjudged by regarding different states of affairs.

"These results vary in each case according as the sacrifice may touch an interest destined for the intermediate port or one for the final port.

"In the first place the liability to contribute, which is to be paid to the interests there separated, becomes a debt fixed and undivided against the other interests. The further subdivision of this debt among the debtors

[1] Motiver til Forslag til Sφlov, pp. 117–8; Copenhagen, n. d. [2] Art. 213.

may be made up according to the state of affairs at the final port. For example, if on the further voyage the ship (which would be considered in the first adjustment) should be lost, then the contribution coming to or from it to the goods discharged in the intermediate port is to be paid, without regard to that due from the cargo bound for the final port.

"If the average act was a damage to through cargo, then the contribution from the goods going to the first port not merely comes into account with that due from through goods, but the same quota from loss which was distributed in the intermediate port, must also be divided in the final port. (Lowndes, 274.) A vessel has goods on board for Liverpool and New York. In the Channel, a part of the latter is jettisoned which will be worth in Liverpool say one thousand marks, and the goods there discharged have to pay ten per cent., according to the condition of affairs in that port. In New York such goods are worth say two thousand marks. The proprietor of this cargo cannot claim nineteen hundred marks, but rather demands two thousand marks less two hundred marks, or only ninety per cent.

"The discharge stands like the sale of parts of cargo, which the master in the common interest had sold in a port of distress. This in general he makes good *there*, and does not subject to the dangers of the further voyage."[1]

This question when thus stated and reasoned out is simplicity itself. The maritime community changes and the liabilities change with it. Each breaking of bulk and discharge of cargo marks the close of a distinct period which must be stated, adjusted and settled between its own coadventurers.[2] To depart from these principles on the score of convenience is to fall into manifold inconsistencies. If the shipowner and cargo interests are not satisfied with the prospect of successive average statements, they can contract against such a contingency by appropriate clauses of the bill of lading.

The examination of this divergence of views further illustrates the nearer approach by the maritime law of the United States to the practice of Germany, and other continental states, instead of following the authorities of Great Britain.

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[1] Heck, pp. 361–2.

[2] "À chaque echelle où le capitaine débarque ou embarque des marchardises, il doit provoquer un réglement d'avaries si, depuis le port précédent il s'est produit des avaries communes. Il importe peu que l'escale soit prévue ou imprévue, voluntaire ou forcée, il suffit que la communauté soit abandonnée par quelques-uns de ses membres ou que de nouveaux membres s'y adjoignent pour que la réparation des avaries se modifie; autant de communautés, autant de réparations." Beltjens, Encyc. du droit Com. Belge, tome iv, p. 553, Namur, 1900.